DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0356 & 02-0355
STATE GROSS RETAIL & GROSS INCOME TAX
For Years 1998 to 2000

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ISSUES

I. Gross Income Tax – Application to municipality for the operation of a golf course.

Authority: Department of Treasury v. City of Evansville, 60 N.E.2d 952, (IN 1945); West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988); City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); IC § 6-2.1-3-29; IC 6-8.1-3-3; 45 IAC 15-3-2

Taxpayer protests subjecting income from operation of a municipal golf course to Gross income tax.

II. Gross Retail Sales Tax – Assessment of sales tax on transactions related to a municipal golf course.

Authority: Department of Treasury v. City of Evansville, 60 N.E.2d 952 (Ind. 1945); 45 IAC 2.2-4-20

Taxpayer protests the assessment of sales tax on transactions related to the operation of its municipal golf course.

III. Tax Administration – Waiver of Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2(b)

Taxpayer seeks waiver of the penalties because the tax liabilities were due to reasonable cause and not due to willful neglect.

STATEMENT OF FACTS

The taxpayer is an Indiana municipality. Its parks and recreation department operates a municipal golf course which charges admission fees and provides various items for rental, including golf carts. Gross income and Gross Retail Sales audits found that the income from the municipal golf course had not had the respective taxes paid on it and an assessment was made, with penalties. A timely protest was made, with a hearing held on February 20th, 2003 and this Letter of Finding resulting.

DISCUSSION

I. Gross Income Tax – Application to municipality for the operation of a golf course.

Taxpayer bases its protest on the argument that while the Indiana Supreme Court held in Department of Treasury v. City of Evansville, 60 N.E.2d 952 (Ind. 1945) that the operation of a golf course was a proprietary or private activity, that holding was based entirely on the fact that Indiana courts had consistently held that the operation of a park system was a proprietary activity, and accordingly, the operation of a golf course should be treated in the same manner. Taxpayer then notes that IC 6-2.1-3-29, enacted after the Court's finding, specifically exempts from the gross income tax "…gross income … derived from the operation of a park or recreation facility…or the performance of similar governmental services is exempt if the gross income is received by the state of Indiana, an agency or instrumentality of the state of Indiana, or a municipal corporation or political subdivision of the state of Indiana." Taxpayer contends that if the golf course is not considered a park or recreation facility, it should, at least, be considered a similar governmental service.

While the above exemptions have been enacted, along with several other exemptions enumerated in Department of Treasury v. City of Evansville, golf courses, which were explicitly found to be a proprietary activity by the Indiana Supreme Court in this case, have never received a statutory or regulatory exemption.

Additionally, Taxpayer argues that if the Department does find the golf course to be a proprietary activity, the finding should be prospective and the assessment should be waived based upon estoppel. Under IC 6-8.1-3-3, the Department of Revenue is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving taxpayer notice of that reinterpretation. IC 6-8.1-3-3(b) states that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is (1) adopted in a rule under this section or (2) published in the Indiana Register . . . ."

In City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998), plaintiff taxpayer argued that the Department could not impose gross income tax on the gain realized from the sale of tax-exempt bonds, because that gain had been treated as exempt for 42 years. Id. at 1128. Plaintiff taxpayer argued that, in the absence of a new rule or regulation, the Department's assessment of gross income taxes against the gain realized from the sale of the tax-exempt bonds was invalid. Id. at 1129. The Tax Court found that – despite the intervening adoption of regulations to the contrary – the Department could not impose the additional taxes

when the Department had permitted plaintiff taxpayer to claim an exemption from the taxes subsequent to the adoption of the intervening regulations. Id. Nevertheless, the Tax Court also held that plaintiff taxpayer, having been placed on notice of its additional tax liability, was responsible for paying the tax on a prospective basis. Id.

However, in West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988), the Tax Court held that respondent Department was not estopped from assessing state income taxes based upon a letter respondent Department had previously issued to petitioner taxpayer. Id. at 1334. The West letter was prepared by respondent Department after petitioner taxpayer had replied to respondent Department's request for a detailed description of petitioner taxpayer's business activities in Indiana. Id. at 1331. Petitioner taxpayer argued that the letter, written by one of respondent Department's tax examiners, stated that petitioner taxpayer bore no state income tax liability because respondent taxpayer's activities within the state were limited to the solicitation of sales. Id. at 1333. The Tax Court disagreed with petitioner taxpayer's contention finding that the "letter does not purport to state that [petitioner taxpayer] bore no tax liability." Id. Instead, the Tax Court found that "[i]t is true that the letter *could* be read as a statement that [petitioner taxpayer] was not liable, but the mere *possibility* that the Department made such a representation is not, in this court's view, sufficient to create estoppel." Id. (*Emphasis added*).

The West letter directed to petitioner taxpayer read as follows:

> This letter is in acknowledgement of your reply to my correspondence of March 28, 1979. The information which you have submitted has proved to be a sufficient answer to the question raised in my previous correspondence. I would like to thank you for your cooperation in this matter. Id.

The Tax Court held that petitioner taxpayer was precluded from asserting the estoppel argument, based upon the representations contained within the ambiguous letter, because – inter alia – there was no evidence that petitioner had changed its position in reliance upon those representations. Id. at 1334.

A particular Indiana taxpayer is entitled to place its reliance upon a Department ruling "based on a particular situation which may affect the tax liability of the taxpayer . . . ." 45 IAC 15-3-2(d)(3). The Department will issue advisory letters to individual taxpayers, some of which will be binding upon the Department and some of which will not bind the Department. 45 IAC 15-3-2(e). When an individual taxpayer directs a written inquiry to the Department, describing in full the factual circumstances surrounding a particular transaction and seeking advice as to the tax consequences of that particular transaction, then "[a]ll such rulings issued will be binding provided that all of the facts described in obtaining the ruling are true and accurate. Any misstatement of material fact or information will void the ruling." Id.

Taxpayer argues, based on assurances it received from state officials and a remark by a presenter at a state Training School for municipal clerk-treasurers, that it is entitled to prospective treatment. Inasmuch as the state has many officials, not all of whom are authoritatively versed in the nuances of State tax law, nor are any authorized to verbally void existing statutes and case

law, remarks and answers can be given that do not comport to state law. Admittedly the remarks at the training seminar focusing on the issues of municipal taxation may have been confusing, nonetheless taxpayer should have been aware that placing reliance on anything less than an explicit- and documented- assertion was questionable. Taxpayer did not make a specific written inquiry, in which taxpayer could have sought advice in writing as to the tax consequences of a particular transaction, pursuant to 45 IAC 15-3-2. Additionally, taxpayer does not provide any state issued documentation on which it relied to make its determination. In a matter of such complexity, reliance solely on verbal representations will not create estoppel.

FINDINGS

Taxpayer's appeal is respectfully denied.

II. Gross Retail Sales Tax – Assessment of sales tax on transactions related to a municipal golf course.

As in issue I, Taxpayer bases its protest on the argument that while the Indiana Supreme Court held in Department of Treasury v. City of Evansville, 60 N.E.2d 952 (Ind. 1945) that the operation of a golf course was a proprietary or private activity, that holding was based entirely on the fact that Indiana courts had consistently held that the operation of a park system was a proprietary activity, and accordingly, the operation of a golf course should be treated in the same manner. Taxpayer then argues that it can be inferred from 45 IAC 2.2-4-20, which states in relevant part, "Municipal corporations,…, shall, in the performance of private or proprietary activities or business, constitute retail merchants making retail transactions in respect to receipts which would constitute gross retail income from a retail transaction if received by a retail merchant." That inasmuch as the argument outlined in Issue I concludes the golf course was not proprietary, similar reasoning applied to this regulation would exempt the proceeds from the sales tax requirements as well.

Given that the Department has concluded, as discussed in Issue I above, that the operation of Golf course is a proprietary activity, 45 IAC 2.2-4-20 does require the collection of sales tax.

FINDINGS

Taxpayer's appeal is respectfully denied.

IV. Tax Administration – Waiver of Penalty

DISCUSSION

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10. The Indiana Administrative Code further provides in 45 IAC 15-11-2:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence

would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.
(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
(1) the nature of the tax involved;
(2) judicial precedents set by Indiana courts;
(3) judicial precedents established in jurisdictions outside Indiana;
(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case. Taxpayer has established that it exercised reasonable care in its analysis of this issue. While taxpayer's arguments are not dispositive, they are factors which are indicative of the taxpayer's reasonable care, caution, or diligence in this matter.

FINDINGS

Taxpayer's appeal sustained.

JM/MR 030304